IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 19, 2007 Session

STATE OF TENNESSEE v. SHAWN BLAIR

Appeal from the Circuit Court for Rutherford County
No. F-58066 Don Ash, Judge

No. M2006-02694-CCA-R3-CD - Filed March 26, 2008

The Appellant, Shawn Blair, was convicted by a Rutherford County jury of possession of 300 grams or more of cocaine with intent to sell or deliver, a Class A felony, and simple possession of marijuana, a Class A misdemeanor. Following a sentencing hearing, Blair was sentenced to concurrent sentences of eighteen years and eleven months and twenty-nine days for the respective convictions. On appeal, Blair raises three issues for our review: (1) whether the evidence is sufficient to support the felony conviction, specifically whether he *knowingly* possessed 300 grams or more of cocaine; (2) whether the trial court erred in refusing to instruct the jury on the lesser-included offenses of (a) facilitation of a felony and (b) possession of 26 grams of cocaine or more, a Class B felony; and (3) whether the State improperly commented upon Blair's right to remain silent during closing arguments. Following review, we conclude that failure to instruct on Class B felony possession of cocaine was error. Accordingly, we reverse and remand for a new trial.

Tenn. R. App. P. 3; Judgment of the Circuit Court Reversed and Remanded

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

James O. Martin, III, Nashville, Tennessee (on appeal); and Rayburn McGowan, Jr., Nashville, Tennessee (at trial), for the Appellant, Shawn Blair.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Jennings Jones, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

The Appellant's felony drug conviction stems from his purchase of a kilogram of cocaine in a "reverse" buy, which was conducted by the Rutherford County Sheriff's Department. The drug

transaction was arranged by a confidential informant, Daniel Jones, who, at the time, was on probation for a drug and a robbery conviction. In late 2005, Jones met the Appellant, whom Jones knew to be "in the drug game," at a strip club, and the two discussed the possibility of future drug dealings. Several days later, the Appellant and Jones met, at which time the Appellant told Jones that he was interested in purchasing a large amount of cocaine. According to the Appellant, he personally could only sell two or three kilograms per week, but his "crew" could sell approximately thirty kilograms per week. After being informed that the price would be $20,000 per kilogram, the Appellant stated that he would pay $18,000 per kilogram. Jones informed the Appellant that he could sell at the $18,000 price if the Appellant bought a minimum of ten kilograms.

Several phones calls followed the initial meeting, some of which were monitored by police. A second meeting was arranged between the Appellant and Jones and occurred on October 27, 2005. From their prior discussions, it was not altogether clear whether the Appellant would purchase the cocaine on this occasion or simply inspect the quality of the cocaine, which was referred to as a "dope show." After arriving at the meeting, the Appellant informed Jones that he did not have the purchase money and that "he wanted to check [the cocaine] out first," and if "he liked it they would probably buy ten [or] five kilograms of cocaine." Jones then placed a call to Detective Killings, an undercover narcotics officer who was acting as an operative of Jones, who had possession of the cocaine. Upon Killings' arrival, Jones and the Appellant got into Killings' vehicle, and Killings displayed a wrapped kilogram of cocaine to the Appellant. The Appellant cut a hole in the packaging and tasted the cocaine, stating it was "good shit." A buy was arranged for a later date. The Appellant never stated that he wanted less than a kilogram and, in fact, discussed purchasing larger amounts. However, he said he would have to check with "his people" and see how much money they could put together before finalizing the amount to purchase.

On November 4, 2005, the reverse buy was transacted. Jones met the Appellant at a Kroger parking lot, and the Appellant got into Jones' car. Jones was once again monitored by the police, and the transaction was videotaped. A conversation between the Appellant and Jones occurred, during which the Appellant mentioned again that he could move three kilograms per week. At this time, the Appellant began handing money to Jones, which the Appellant removed from his pockets, his shoes, and his socks. Once Jones believed that the Appellant had delivered a "substantial" amount of money, he called Killings. Jones then began counting the money delivered to him by the Appellant. Jones stated that he could tell that the Appellant was short of the purchase price; and, in fact, the Appellant told Jones that he was short and asked Jones what he wanted to do about it. The Appellant, however, never mentioned that he did not want to purchase the entire kilogram. While Jones was still counting, Killings arrived. Killings exited his vehicle, opened the passenger side door of Jones' vehicle, and placed the kilogram of cocaine in the Appellant's lap, asking if they were "straight." The Appellant responded that they were. Killings then left the scene without ever being informed that the Appellant had only given Jones $4300, which would purchase approximately 54[1] grams of cocaine, rather than the agreed-upon price of $18,000 for 1,000 grams. As the Appellant

[1] The Appellant's computation of 54 grams is based upon testimony at trial that the street value of cocaine, when sold in smaller quantities, is approximately $80 per gram.

was exiting Jones' car, Jones informed the Appellant that he was way short of the agreed purchase price. Without hesitation, the Appellant then returned to his car and threw the kilogram of cocaine, which was in a McDonald's bag, into the backseat. At this point, officers approached, and the Appellant was arrested. Following the Appellant's arrest, police searched his vehicle and recovered the kilogram of cocaine, as well as a small bud of marijuana in the front driver's side seat of the car. Forensic analysis later revealed that the packaged cocaine found in the Appellant's car weighed 1096.4 grams, which included approximately 150 grams in packaging weight.

On January 5, 2006, a Rutherford County grand jury returned an indictment charging the Appellant with: (1) possession of 300 grams or more of cocaine with intent to sell or deliver, a Class A felony; and (2) Class A misdemeanor possession of marijuana. Following a jury trial in August, 2006, the Appellant was convicted as charged. A sentencing hearing was held on October 6, 2006, at which the trial court sentenced the Appellant to concurrent sentences of eighteen years for the possession of cocaine and to eleven months and twenty-nine days for the possession of marijuana conviction. After the denial of the Appellant's motion for new trial, the instant timely appeal was filed.

Analysis

On appeal, the Appellant has raised three issues for our review. First, he asserts that the trial court erred in denying his motion for judgment of acquittal because the evidence is insufficient to support his conviction for felony possession of 300 grams or more of cocaine. Second, he asserts that the trial court erred by refusing his request to instruct the jury on the lesser-included offenses of facilitation of a felony and possession of 26 grams or more of cocaine, a Class B felony. Finally, the Appellant contends that the court erred by refusing to grant a mistrial after the prosecutor improperly commented upon his right to remain silent during closing argument.

I. Motion for Judgment of Acquittal/Sufficiency of the Evidence

On appeal, the Appellant contends that the evidence does not support the verdict that he *knowingly* possessed, with intent to sell or deliver, 300 grams or more of cocaine. According to the Appellant "there was no evidence he knew or, more accurately, should have known he had just had a kilogram of cocaine dropped in his lap." His argument is based upon the premise that it would be "wholly unreasonable" for anyone to be reasonably certain that their conduct of bringing $4300 to a drug transaction, when they had been informed the price per kilogram was $18,000, would result in the possession of 300 grams or more of cocaine, as $4300 would only purchase approximately 54 grams. In other words, the evidence presented demonstrated that the amount of money he paid was "extremely inconsistent" with the amount of cocaine delivered to him. According to the Appellant, "the only reasonable explanation for the events which transpired is an agreement between [Jones] and [the Appellant] for the purchase of a much smaller quantity of cocaine," and Jones "then allowed the detectives to believe a larger deal had been made in order to fulfill his obligations to [the State] and remain out of prison." The Appellant argues that the jury could have reached a guilty verdict

only by speculating as to some arrangement that had been made for him to receive the drugs for a reduced amount.

Initially, we would note that a motion for judgment of acquittal requires that the trial court determine the sufficiency of the evidence. Tenn. R. Crim. P. 29(a). Accordingly, the standard of review for a motion for judgment of acquittal is the same as that utilized when analyzing the sufficiency of the convicting evidence. *State v. Blanton*, 926 S.W.2d 953, 957-58 (Tenn. Crim. App. 1996). In considering this issue, we apply the rule that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Tennessee Code Annotated section 39-17-417(a)(4) and (j)(5) provides that it is an offense for a defendant to knowingly possess 300 grams or more of any substance containing cocaine with the intent to manufacture, deliver, or sell the controlled substance. "Knowingly" means that a person acts knowingly with respect to the conduct or to the circumstance surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Review of the record reveals that there is no dispute that the Appellant did in fact possess well over the requisite 300 grams of cocaine, as he was found in possession of 1096.4 grams of cocaine, less approximately 150 grams in packaging weight. Nor does he dispute that the proof establishes that he acquired possession of the cocaine for the purpose of its sale or delivery. The only element contested by the Appellant is that he knew that he was in possession of 300 grams or more of cocaine.

We conclude that the evidence presented more than supports the jury's verdict. The Appellant took possession of the cocaine from Detective Killings and placed it into his car. Moreover, the Appellant made repeated comments that he wanted to purchase a kilogram of cocaine, and possibly more, even indicating that he could possibly sell two to three kilograms per week. The

evidence shows no indication that the Appellant ever intended to purchase a lesser amount despite the fact that he was short of the purchase price. The agreement between the parties was clearly for the Appellant to purchase a kilogram of cocaine, and no evidence presented indicates that the Appellant intended to take possession of a lesser amount. As noted by the State, much of the Appellant's argument is based upon an attack of the informant Jones' credibility, implying that Jones had a motive for ensuring conviction of the greater crime. However, the assessment of Jones' credibility was a determination for the trier of fact, and we will not second-guess such a determination. *See Pappas*, 754 S.W.2d at 623. After review, we conclude that the evidence is more than legally sufficient to establish that the Appellant knowingly possessed 300 grams or more of cocaine with the intent to sell or deliver.

II. Jury Instructions/Lesser-Included Offenses

Next, the Appellant contends that the trial court erred in refusing to charge the lesser-included offenses of facilitation of a felony and possession of 26 grams or more of cocaine. It is well-settled that a defendant has a constitutional right to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions. *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005). It is the trial court's duty to give the jury proper instructions as to the law governing the issues raised by the nature of the proceedings and the evidence introduced at trial. *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990). The question of whether a given offense should be submitted to the jury as a lesser-included offense is a mixed question of law and fact. *State v. Rush*, 50 S.W.3d 424, 427 (Tenn. 2001) (citing *State v. Smiley*, 38 S.W.3d 521 (Tenn. 2001)). The standard of review for mixed questions of law and fact is *de novo* with no presumption of correctness. *Id*.; *see also State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

"In applying the lesser-included offense doctrine, three questions arise: (1) whether an offense is a lesser-included offense; (2) whether the evidence supports a lesser-included offense instruction; and (3) whether an instructional error is harmless." *State v. Allen*, 69 S.W.3d 181, 187 (Tenn. 2002). If an offense is a lesser-included offense of the charged offense, the trial court must then determine whether the record contains any evidence which reasonable minds could accept as to the lesser-included offense and whether the evidence is legally sufficient to support a conviction of the lesser-included offense. T.C.A. § 40-18-110(a) (2006). In making these determinations, the trial court must consider the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgment on the credibility of such evidence. *Id*.

The failure to instruct the jury on lesser-included offenses requires a reversal for a new trial unless a reviewing court determines that the error was harmless beyond a reasonable doubt. *State v. Ely*, 48 S.W.3d 710, 727 (Tenn. 2001). In making this determination, the reviewing court must "conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury." *Allen*, 69 S.W.3d at 191.

a. Facilitation

First, the Appellant contends that the trial court erred in failing to grant his request to instruct the jury upon the lesser offense of facilitating the felony of knowing possession of 300 grams or more of cocaine with the intent to sell or deliver. In support of this argument, the Appellant relies upon the testimony of the informant Jones, that the Appellant informed Jones at their initial meeting that he did not have any money and would have to "get with his crew" to determine how much "they" wanted to buy and how much money "they" could round up. He further points to an alleged conversation, which was not recorded, between the informant and the Appellant in which the Appellant discussed how much cocaine he could purchase with his "crew" or the "people he worked with" as opposed to how much he could handle by himself. According to the Appellant, this demonstrates that he was not acting alone but rather in combination with or on behalf of others.

We acknowledge, as argued by the Appellant, that facilitation is a lesser-included offense under part (c)(1) of the *Burns* test. *See Burns*, 6 S.W.3d at 466-67. However, we agree with the State that the evidence presented cannot "reasonably be interpreted to support a conviction for facilitation [of possession of cocaine with intent to sell]." *See State v. Page*, 184 S.W.3d 223, 228 (Tenn. 2006). To convict of facilitation in this case would require proof that the Appellant knew "that another person intended to commit" the crime of possession of 300 grams or more of cocaine and that the Appellant furnished "substantial assistance" to that person, although the Appellant did not have "the intent to promote or assist in the commission of the crime or to benefit in the proceeds or results of the offense." *See* T.C.A. § 39-11-403 (2006).

First, the proof in this case fails to establish the identity or existence of "another person" who participated in the commission of the crime. Notwithstanding references to unknown persons, it was the Appellant who entered into the drug transaction, who inspected the drugs, who supplied the money for the drug purchase, and who solely assumed possession of the contraband. Furthermore, the proof belies the Appellant's position that he had no intent to benefit in the proceeds of the crime, as the Appellant made clear his ability to "move three [kilograms of cocaine] a week." For these reasons, we conclude that an instruction on the lesser offense of facilitation was not supported by the evidence at trial. Thus, no error resulted from the court's failure to instruct the jury with regard to this offense.

b. Possession of 26 Grams or More of Cocaine

The Appellant also contends that the trial court erred by not instructing upon the lesser Class B felony offense of possession of 26 grams or more of cocaine, asserting that the issue is not the weight of the cocaine recovered but "whether the evidence supports a finding that the [Appellant] knew the quantity he possessed." As relied upon in his sufficiency argument, the Appellant premises his assertions on the fact that he arrived with an insufficient amount of money to purchase the quantity of cocaine which he received. According to the Appellant, "[w]hen that undisputable fact is considered, along with the questionable manner in which the large amount of drugs were conveyed to him, there can be no doubt the evidence was legally sufficient" to support a conviction for the knowing possession of a quantity of cocaine of 26 grams or more. *See* T.C.A. § 39-17-

417(i)(5),(j)(5) (2006).[2] The record reflects that the trial court instructed the jury only on the indicted offense of possession of 300 grams or more of cocaine and denied the Appellant's specific request to instruct on the lesser Class B possession offense.

We agree with the Appellant that the crime of possession of 26 grams or more of cocaine is a lesser-included offense of possession of 300 grams or more of cocaine under part (a) of the *Burns* test. *See Burns*, 6 S.W.3d at 466-67. Clearly, all of the statutory elements of the lesser offense of possession of 26 grams or more of cocaine are included within the statutory elements of the charged offense. "As a general rule, evidence sufficient to warrant an instruction on the greater offense also will support an instruction on a lesser offense under part (a) of the *Burns* test." *Allen*, 69 S.W.3d at 188 (Tenn. 2002). The reasoning behind the general rule is that in "proving the greater offense the State necessarily has proven the lesser offense because all of the statutory elements of the lesser offense are included in the greater." *Id*. (citing *State v. Bowles*, 52 S.W.3d 69, 80 (Tenn. 2001)).

As previously noted, the evidence is clearly sufficient to support the greater offense in this case, as it was established that the Appellant bargained for and possessed 1096.4 grams, which included approximately 150 grams for packaging weight. Nonetheless, our supreme court has held that error in omitting a lesser-included offense instruction is not negated merely because the evidence is sufficient to convict on the greater offense. *Id*. A defendant need not demonstrate a basis for acquittal on the greater offense to be entitled to an instruction on the lesser offense. *Id*. The court

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[2] Tennessee Code Annotated section 39-17-417 (2006) provides:

(a) It is an offense for a defendant to knowingly:

. . . .

(4) Possess a controlled substance with intent to manufacture, deliver or sell the controlled substance.

. . . .

(i) A violation of subsection (a) with respect to the following amounts of a controlled substance . . . is a Class B felony . . . :

. . . .

(5) Twenty-six (26) grams or more of any substance containing cocaine;

. . . .

(j) A violation of subsection (a) with respect to the following amounts of a controlled substance . . .. is a Class A felony . . . :

. . . .

(5) Three hundred (300) grams or more of any substance containing cocaine[.]

must provide the instruction on a lesser-included offense which is supported by the evidence, even if such instruction is not consistent with the theory of the State or the defense. *Id*. It is the evidence, not the theories of the parties, which controls whether an instruction is required. *Id*.

In this case, there was evidence from which a rational juror could have inferred that the Appellant was guilty of the crime of possession of 26 grams or more of cocaine. The Appellant presented evidence to support his theory that he intended to possess a smaller amount of cocaine, based upon the fact that he produced less than one-fourth of the amount of money required to purchase the entire kilogram. Because the evidence was introduced, it became a question for the jury to resolve. Accordingly, it was error for the trial court not to charge the jury on the requested lesser offense.[3]

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[3]Implicit within the denial of the request for the lesser-included instruction is the trial court's finding that the uncontroverted proof established that the Appellant possessed in excess of 300 grams of cocaine; thus, no lesser offense was established. In *Good v. State*, 69 Tenn. 293 (Tenn. 1878), our supreme court observed:

> When it is clear that the grade of offense charge is proved, and there is no room for doubt as between it and a lesser grade embraced by statute in the higher, and of course included in the indictment, to charge the law pertaining to such lesser grades would simply tend to confuse and mislead the jury, and often result in verdicts inadequate to the crime actually committed. . . .

Good, 69 Tenn. at 294-95; *accord State v. Stephenson*, 878 S.W.2d 530 (Tenn. 1994) (where the evidence in a record clearly shows that the defendant was guilty of the greater offense and is devoid of any evidence permitting an inference of guilt of the lesser offense, the trial court's failure to charge on a lesser offense is not error); *State v. Boyd*, 797 S.W.2d 589 (Tenn. 1990) (where the record clearly shows that the defendant was guilty of the greater offense and is devoid of any evidence permitting an inference of guilt of the lesser offense, it is not error to fail to charge on the lesser offense); *State v. King*, 718 S.W.2d 241(Tenn. 1986) (where the evidence clearly shows that defendant was guilty of the greater offense, it is not error to fail to charge on a lesser-included offense); *State v. Mellons*, 557 S.W.2d 497 (Tenn. 1977) (it is not reversible error to fail to give an instruction on a lesser offense of which there is no evidence in the record); *Johnson v. State*, 531 S.W.2d 558 (Tenn. 1975) (there is no requirement to include such instructions when no evidence at all is offered as to lesser-included offenses); *Whitwell v. State*, 520 S.W.2d 338 (Tenn. 1975) (it is not error to refuse to charge a lesser offense where, under the evidence, defendant can be guilty of the greater offense or no offense at all); *Strader v. State*, 362 S.W.2d 224 (Tenn. 1962) (reaffirming the principle rule "that no lesser charge be given where there is '*no evidence'* of such offense."); *Baker v. State*, 315 S.W.2d 5 (Tenn. 1958) (where there is no evidence to support a lesser-included offense and, therefore, the accused can be guilty only of the greater offense or no offense at all, it is not error to refuse to instruct on the lesser-included offenses). Review of these supreme court decisions reveals that the law, with regard to the "no evidence" language, was that a lesser instruction was not required, irrespective of a *Blockberger* analysis, because, in such cases, there was no evidence that the offenses which were actually committed were less than that charged.

Although this lesser-included principle oftentimes still finds application at the trial court level, as illustrated by this case, we emphasize that this principle no longer survives as the ultimate litmus test. In *Burns*, 6 S.W.3d at 472, our supreme court held that merely because the evidence is sufficient to convict on the greater offense, this will not excuse a charge on a lesser if the evidence is also sufficient to convict of the lesser. Moreover, in *Allen*, 69 S.W.3d at 187-88, our high court held that "[t]he trial court must provide an instruction on a lesser-included offense supported by the evidence even if such instruction is not consistent with the theory of the State or of the defense."

Having concluded that the trial court erred in failing to instruct the jury with regard to the lesser-included offense of possession 26 grams or more of cocaine, we next address whether the error was harmless beyond a reasonable doubt. *Allen*, 69 S.W.3d at 189 (citing *State v. Ely*, 48 S.W.3d 710, 727 (Tenn. 2001)). Our supreme court has held that an erroneous failure to charge a lesser-included instruction to the jury will result in reversal unless the reviewing court concludes beyond a reasonable doubt that the error did not affect the outcome of the trial. *Id*. (citing *Bowles*, 52 S.W.3d at 77)). In making this determination, a reviewing court should conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of the defense, and the verdict returned by the jury. *Id*. at 191.

We are unable to conclude, in the instant case, that the trial court's error in failing to charge the requested instruction was harmless beyond a reasonable doubt. As noted, the Appellant introduced evidence that he intended to possess a lesser amount of cocaine. Nothing before us precludes a finding that the jury could have accepted the Appellant's theory if they had been so charged. Accordingly, we must reverse the Appellant's conviction for Class A felony possession of 300 grams or more of cocaine and remand the case to the trial court for a new trial.

III. Comment Regarding Right to Remain Silent

Finally, the Appellant contends that the trial court erred in denying his motion for a mistrial based upon comments made by the prosecutor during closing argument regarding the Appellant's failure to present evidence, which the Appellant alleges infringed upon his constitutional right to remain silent. Our supreme court has long recognized that closing argument is a valuable privilege for both the State and the defense, and wide latitude is granted to counsel in arguing their cases to the jury. *State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1994). Trial judges in turn are accorded wide discretion in their control of these arguments, *State v. Zinkle*, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995), and this discretion will not be interfered with on appeal in the absence of abuse thereof. *Smith v. State*, 527 S.W.2d 737, 739 (Tenn. 1975). Notwithstanding such, arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law. *Coker v. State*, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995).

When argument is found to be improper, the established test for determining whether there is reversible error is whether the conduct was so improper or the argument so inflammatory that it affected the verdict to the Appellant's detriment. *Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965). In measuring the prejudicial impact of any misconduct, this court should consider: (1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecution; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case. *State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003); *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); *see also State v. Buck*, 670 S.W.2d 600, 609 (Tenn. 1984).

Both the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a defendant's right to remain silent and to present no witnesses or other evidence in defense. *State v. Grady E. Shoffner*, No. 03C01-9403-CR-00113 (Tenn. Crim. App. at Knoxville, June 27, 1995). Tennessee law has long held that any adverse comment upon the failure of a defendant to testify, made by the State before the jury, constitutes a violation of the defendant's rights. *Id*. Such a violation, upon timely objection, is reversible error unless the trial judge requires counsel to stop and properly instructs the jury. *State v. Hale*, 672 S.W.2d 201, 202 (Tenn. 1984) (citing *Staples v. State*, 14 S.W. 603 (Tenn. 1890)).

However, the State's argument on a defendant's failure to refute certain portions of the case does not necessarily violate a defendant's right to remain silent. Where the argument is restricted to a comment on the failure to offer witnesses other than the defendant, the comment may not necessarily impinge upon the rights guaranteed by our constitution. *McCracker v. State*, 489 S.W.2d 48, 50 (Tenn. Crim. App. 1972). The rule is that no argument of guilt may be based on a defendant's failure to take the stand. *Id*. Tennessee case law, however, recognizes that impressions may be implicitly conveyed to juries and that such impressions may be conveyed by means other than direct assertion. A comment on the failure of the defense to produce certain evidence will not always avoid violating the right to remain silent. *Id*. at 51.

The following colloquy occurred during the State's rebuttal argument:

> [State]: The proof in this case is uncontested. There has been no testimony from the defense. You haven't heard - -
>
> [Defense Counsel]: I object to that, Your Honor.
>
> The Court: Overruled.
>
> [State]: You have not heard a word of proof - -
>
> [The Court]: Have a seat. I've overruled your objection. It's argument.
>
> [State]: The only proof is that this cocaine was sold to the [Appellant] and was then in his possession. That's the only proof. . . .

The Appellant argues that the trial court erred in not granting a mistrial following this colloquy or, at least, sustaining the objection and offering a curative instruction. After deliberations began, trial counsel clarified his objection to the comments, asserting that the State had commented on the Appellant's right to remain silent. The trial court responded, "I did not think that's what he did at all."

After review, we agree with the trial court that the State's comments did not amount to commenting upon the Appellant's right to remain silent. This court has held that a prosecutor's

comment that no proof whatsoever was presented by the defense was not a comment upon a defendant's failure to testify. *State v. Copeland*, 983 S.W.2d 703, 708-09 (Tenn. Crim. App. 1998) (citing *State v. Livingston*, 607 S.W.2d 489, 492 (Tenn. Crim. App. 1980)); *see also State v. Grady E. Shoffner*, No. 03C01-9403-CR-00113. In this case, the prosecutor merely noted that the State's proof was uncontradicted, as he made no direct reference to the Appellant's decision not to testify and did not suggest that the jury could infer guilt from the failure to put forth any evidence whatsoever. As the trial court found, nothing in the statements made by the prosecution infringed upon the Appellant's right to remain silent. Moreover, the jury was specifically instructed that the State bore the burden of proof in the case and that the Appellant was not required to testify.

Regardless, we note that even if the prosecutor's remarks were overreaching or constitutionally infirm, they did not render the Appellant's trial unfair. *See Goltz*, 111 S.W.3d at 6; *Judge*, 539 S.W.2d at 344. The record reveals that the prosecution's comments were an isolated occurrence which occurred during the rebuttal portion of closing argument made directly in response to statements which defense counsel made in his closing arguments. While no curative instruction was given by the court, the court did instruct the jury that the Appellant was not required to put on any evidence and that no consideration or inference could be drawn from his decision not to testify.

CONCLUSION

We conclude from our review of the evidence under the required analysis of *Burns* that a factual issue was presented with respect to the amount of cocaine possessed which required resolution by the jury. Because the trial court erred in denying an instruction on the lesser-included offense of possession of 26 grams or more of cocaine, we vacate the judgment of conviction and remand for a new trial.

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DAVID G. HAYES, JUDGE